United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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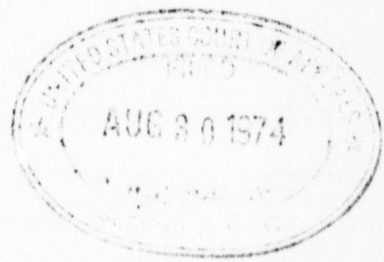
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- HORSUN HOWARD, Defendant-Appellant.	Docket No. 74-1282



APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

1. Whether in a prosecution for bank robbery it was reversible error for the trial court to fail to charge the jury with respect to any of the essential elements of the two separate offenses alleged in the indictment, notwithstanding the fact that defense counsel did not except to the failure to so charge.

2. Whether, under the particular circumstances of this case, it was reversible error for the trial court to refuse to instruct the jury, as requested by defense counsel, about

the dangers of misidentification, or to make any reference whatsoever in its charge regarding the issue of identification.

3. Whether the in-court identification of the defendant should have been excluded because of the impermissibly suggestive procedures utilized by the Government.

4. Whether the jury was improperly empaneled as a result of the trial court, in effect, depriving the defendant of his right to exercise a peremptory challenge against an alternate juror.

5. Whether the trial court committed reversible error when it refused to grant a mistrial or set aside the verdict where there was a substantial likelihood that the jurors viewed the arrest of the defendant on an unrelated charge during the course of the trial.

Alternatively, whether it was incumbent upon the trial court to conduct an evidentiary hearing to determine whether the jury's verdict was affected by that incident.

PRELIMINARY STATEMENT

On June 30, 1971, Horsun Howard was found guilty by a jury of bank robbery and the placing in jeopardy the lives of bank employees and others present in the commission of the robbery in violation of 18 U.S.C. §2113(a) and (d) (T.973).* The jury was unable to agree with respect to his co-defendant, Fred Fernandez. Two subsequent convictions of Fernandez have been reversed by this Court.** The Government is presently appealing an order dismissing the indictment for failing to turn over certain materials to Fernandez (Docket No. 74-1164).

On October 8, 1971, Howard was sentenced by the trial judge, the Hon. Walter Bruchhausen, to a term of 15 years imprisonment, which he is presently serving.

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* All references in this brief to the minutes of the trial as well as the pre-trial hearings which immediately preceded it, will be prefixed by "T." All references to the jury selection proceedings, will be prefixed by "V."

** 456 F.2d 638 (1972) and 480 F.2d 726, sometimes referred to herein as Fernandez I and II, respectively.

Because his time to appeal the judgment of conviction had lapsed, it was necessary for Howard to seek collateral relief in order to secure that right. On February 19, 1974, this Court (Anderson, Mansfield, Oakes, C.J.'s) reversed the District Court's ruling and ordered that Howard be permitted to file an out-of-time appeal pursuant to 28 U.S.C. §2255.*

PRE-TRIAL HEARINGS

Pre-trial hearings were held before Judge Bruchhausen with respect to the photographic identification of the defendant by employees of the bank on February 10 and March 2, 1971.** At the conclusion of the hearings, counsel moved to suppress the identification testimony on the grounds, inter alia, that the photographs displayed to the witnesses were overly suggestive (T. 502). The motion was denied.

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* Docket No. 73-2142. The decision is reported at 492 F.2d 1237 (table).

** A hearing was also held with respect to a search of the co-defendant's home, which is not relevant to this appeal.

STATEMENT OF THE CASE

Five witnesses, all employees of the bank, made an in-court identification of Howard as one of the perpetrators of the robbery on December 24, 1970.* Howard was arrested on February 2, 1971 (T. 15). He was never placed in a line-up (T. 71).

All of the identifying witnesses were interviewed by the Federal Bureau of Investigation on the day of the robbery.

Gerondel was interviewed by Agent Graham at which time she was able to give a description of one of the perpetrators as being a black male, 19 to 20 years of age, wearing a balloon hat, a kneee length coat, and having no facial hairs. Graham's report of the interview recites:

> Gerondel advises that she could not provide any descriptive data concerning the rest of the men involved in...the robbery.
>
> (T.797-8)**

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* Louise Cogan (T.707-8); Josephine Denisco (T.629-30); Dilia Gomez (T. 584); Theresa Carlson (T.722); and Barbara Gerondel (T.653).

**When on cross-examination Gerondel was asked about the description of the perpetrator she now identified as Howard, she gave to the F.B.I. on December 24, 1970, she said:

> He was heavy. He was light-skinned. I -- I'm not sure, I think I said he had a beard, a small goatee.
>
> (T.663)

Carlson was interviewed by Agent Wisnofsky on the day of the robbery, at which time she gave a description of the robber whom she subsequently identified as the defendant Howard, as follows:

> Male Negro; 5'6" tall; 200 pounds; stocky build; medium Afro; wearing a black beret and a 3/4 length coat; and wearing wide rimmed sunglasses.
>
> (T.859)*

At trial, Carlson recalled telling the F.B.I. on December 24, 1970, that the individual subsequently identified as the defendant had "very heavy thighs" (T.725-5)

The witness Gomez recalled telling the F.B.I. on December 24 that the robber she identified months later as Howard was:

> About 5'3" or 5'4" tall; heavy set.
>
> (T.598)

The witness Cogan testified that she informed the F.B.I. on the day of the robbery that the man later identified by her as Howard was "very heavy set" (T.713).

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* Gerondel also recalled that this individual was wearing sunglasses (T.665).

On February 10, 1971, Agent Sweeney brought six photographs * to the bank and displayed them to Gomez (T.587-8); Carlson (T.723); Cogan (T.708-9); and Denisco (T.631), all of whom picked out the photograph of Howard as one of the perpetrators. Sweeney displayed the same photographs to Gerondel on March 2, 1971, who likewise selected the photograph of the defendant (T.654-5).

As Agent Sweeney testified, and as the photographs themselves reveal, of the six photographs shown to the witnesses, only one, Howard's, depicted an individual wearing sunglasses (T.824-5).

Moreover, only Howard's photograph showed an individual whose lower torso was visible (T.77-8), thus increasing the danger that the witnesses would only select Howard's photograph since he was indeed heavy set.

In addition, the other five individuals whose photographs were in the display were all considerably older than the defendant, who was just 18 at the time of trial.**

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* Government Exhibit 7.

** The photographs each have the date of birth of the subject. One was 35 years of age; two were 34; and the remaining two were in their mid-20's (T.21; Govt. Exh. 7).

Agent Sweeney not only presided at the display of the photographs on February 10 and March 2, 1971, but was present at the Federal Detention Headquarters in New York City when, shortly after he was arrested, Howard was photographed (T.821-2). By that time, of course, Sweeney had seen the surveillance photographs which revealed that the "heavy set" robber was wearing sunglasses.

Indeed, at the pre-trial hearings, Sweeney testified that he exhibited a composite photograph derived from the surveillance photographs to two of the witnesses* who subsequently identified Howard, more than a month prior to that identification in February, 1971 (T.130, 1401).

It was Sweeney who selected the photographs to be displayed to the witnesses (T.20), but who "neglected" to display to the witnesses any photographs of the defendant Howard in which he was not wearing sunglasses, although such photographs were available (T.821-4).

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* Gomez and Cogan.

This blatant scheme of inviting an identification of the defendant was repeated when, just a few days prior to the trial, each witness was shown the same photographs plus the surveillance photographs, on two separate occasions (T.611-2, 648, 718, 729). At the pre-trial hearings, Carlson testified that on June 15, 1971, Assistant United States Attorney Schlam came to the bank, armed with the photographs, and asked her:

> ... if I remembered the spread /of photographs/ and then he asked me if I could pick out the same photographs that I picked out the first time.
>
> (T. 343)

It is submitted that the procedures utilized with respect to the identification of Howard were impermissibly suggestive. Moreover, those procedures were conducive to and undoubtedly resulted in a substantial likelihood of misidentification.

It is recognized that in both Fernandez I and II, this Court ruled that those witnesses who had made an identification of Fernandez would be permitted to do so at a new trial because of their supposed ability to make an untainted identification, based on the duration of the robbery and the witnesses' opportunity to observe the defendant (456 F.2d at p. 642; 480 F.2d at p. 736).

The record simply does not substantiate that optimistic view.

The entire identification process, it is submitted, is infected with the grossest sort of suggestibility. What remains is a fleeting glance intermingled with retained images of the offending photographs.

POINT I

THE TRIAL COURT'S CHARGE TO THE JURY WAS SO DEFICIENT THAT REVERSAL OF THE CONVICTION IS REQUIRED

A. Essential Elements of the Offenses Charged

It is elementary that

> In a criminal case a court should instruct on all essential questions of law involved in the case, whether requested or not.
>
> Kreiner v. United States, 11 F.2d 722, 731 (2d Cir., 1926). See also United States v. Gillilan, 288 F.2d 796 (2d Cir., 1961).

The defendant was charged, along with others, in two separate counts with robbing a bank and with putting in jeopardy the life of other persons by the use of a dangerous weapon while committing the robbery (18 U.S.C. §2113(a) and (d)).

At the outset of its charge, the trial court advised the jury, in synoptic fashion, of the allegations set forth in the two counts of the indictment (T.943-4). It went on to read from the aiding and abetting provisions of 18 U.S.C. §2, and then placed a brief gloss on what constituted aiding and abetting (T.944-5).

However, the trial court failed to instruct the jury, even in passing, as to any of the essential elements of either of the two crimes charged. There was neither a recitation nor a discussion of the elements of the two offenses charged, or even a reading of the pertinent provisions of the bank robbery statutes.

Trial counsel did not specifically except to this glaring omission, nor, as far as can be ascertained, were there any requests to charge submitted pertaining to the essential elements of the offenses charged.*

The failure of the court to instruct the jury regarding the elements of the two offenses charged constituted error of such fundamental proportions that the lack of exception to the charge comes well within the "plain error" provision of Rule 52(b) of the Federal Rules of Criminal Procedure.

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* Howard's counsel did take "a general exception to the charge." (T.955)

In United States v. Fields, 466 F.2d 119 (2d Cir., 1972), the conviction for unlawfully receiving and possessing a stolen vehicle and for conspiracy, was reversed, notwithstanding substantial evidence of the defendant's guilt and defense counsel's failure to except to the defects in the charge. This Court held that:

> ...the errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are. (at p. 121)

See also United States v. De Marco, 488 F.2d 828, 832 (2d Cir., 1973); United States v. Alsondo, 486 F.2d 1339, 1344 (2d Cir., 1973); United States v. Houle, 490 F.2d 167, 172 (2d Cir., 1973); United States v. Small, 472 F.2d 818, 819 (3d Cir., 1972); United States v. Williams, 463 F.2d 958 (D.C. Cir., 1972); United States v. Musgrave, 444 F.2d 755,764 (5th Cir., 1971). Cf. Screws v, United States, 325 U.S. 91, 197 (1945).

It is true that defense counsel did not place in issue the fact that the bank in question was robbed (T.875, 909). Nevertheless, it was still incumbent upon the trial court to instruct the jury as to the elements of the crimes charged.

In United States v. Clark, 475 F.2d 240 (2d Cir., 1973), the Government attempted to combat the effect of the trial court's

failure to completely and accurately charge with respect to an essential element of the crime, by contending that his defense minimized the omission. This Court rejected that argument, holding that,

> Whatever defense appellant chose to stress for his part, the government retained the burden of proof beyond a reasonable doubt of each element of the offense, including intent to distribute narcotics. Moreover, that burden had to be met on the basis of proper instructions.
>
> (at p. 249)

It reaffirmed the cardinal principle that

> If justice is to be done in accordance with the rule of law, it is of paramount significance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved beyond a reasonable doubt.
>
> (at p. 248)

The case at bar does not concern a "mere" defective or incomplete charge, but involves a total failure to charge any of the essential elements of the offenses. No decision by this Court could be found where a conviction under such circumstances was upheld.

In Byrd v. United States, 342 F.2d 939 (D.C. Cir., 1965), a conviction for bank robbery was overturned on a like omission on the part of the trial judge to instruct the jury as to the elements of the crime.

> The charge to the jury contains neither a recitation nor a discussion of the elements of the offense.... The only guidance given to the jury as to the nature of the offense, and the burden upon the Government to prove every essential element thereof, consisted of a reading of the robbery statute.
>
> (at p. 940)*

The Government in Byrd argued that no prejudicial error resulted from the trial court's failure to charge since there was no dispute over the fact that the bank had been robbed and that the only issue was the identity of the perpetrator. Rejecting that contention, the court said:

> This argument fails to consider the fundamental nature of the defendant's right to have the question of his guilt determined solely by the jury. By pleading not guilty, the accused puts the Government to the burden of proving every element of the crime beyond a reasonable doubt. Strict procedural safeguards have been erected to insure that this privilege is not lightly waived. In view of these safeguards, it would be anomalous indeed if defense counsel, by taking this argumentative position in his closing statement, could thus informally waive his client's right to have the jury pass on the essential elements of the crime.
>
> (at p. 941)

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* As already noted, the court below did not even read the federal bank robbery statute to the jury.

As here, no exception was taken in Byrd. Nevertheless, the failure to so charge was held to be "plain error" - indeed - as the court put it, "fundamental error" for the trial judge "to send the case to the jury without instructions as to the elements of the offense which the Government must prove beyond a reasonable doubt before a verdict of guilty can be returned." (Ibid.) See also, United States v. Harris, 346 F.2d 182, 184 (4th Cir., 1965); Government of the Virgin Islands v. Carmona, 422 F.2d 95, 99 (3d Cir., 1970); United States v. O'Dell, 462 F.2d 224, 232 (6th Cir., 1972).

On this ground alone, the judgment of conviction must be reversed.

B. Eyewitness Identification

Defense counsel excepted to the trial court's failure to instruct the jury about the dangers of misidentification by eyewitnesses (T.953-5). Counsel had submitted to the trial court written requests to charge* which contained, so it would seem language pertaining to those dangers contained in United States

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* These requests were marked as defendant's Exhibit K for Identification (T.955). As of the writing of this brief, that exhibit could not be located. However, even in its absence, the record is clear that this is what was requested.

v. Wade, 388 U.S. 218 (1967) and Simmons v. United States, 390 U.S. 377 (1968). The court declined to "add any further charges" (T.955).

In Fernandez I, this Court pointed out that while a defendant is not entitled to a reading of all that was said about the dangers of misidentification in Wade and Simmons,

> ...we would think it reasonable that a properly drafted instruction, drawing particularly on Mr. Justice Harlan's language in Simmons, should be given if requested. (456 F.2d at p. 644)

Cf. United States v. Telfaire, 469 F.2d 552 (D.C. Cir., 1972); Macklin v. United States, 409 F.2d 174 (D.C. Cir., 1969); United States v. Barber, 442 F.2d 517 (3d Cir., 1971).

This Court also went on to observe in Fernandez I that

> Whether failure to do so would constitute reversible error would depend upon the circumstances. (Ibid.)

In a subsequent decision, this Court reaffirmed its ad hoc approach to the problem and declined to rule that the refusal of the trial court to give an additional instruction specifically focused on identification testimony was erroneous, where there were "careful and accurate" instructions given to the jury. United States v. Evans, 484 F.2d 1178, 1188 (2d Cir., 1973).

It is submitted that under the peculiar circumstances of this case, the failure to give a Wade-Simmons instruction constituted reversible error.

While it is clear that the single most important question for the jury to decide was whether the prosecution had established, beyond a reasonable doubt, that the defendant was one of the perpetrators of the bank robbery, literally no mention of this was made by the trial court. The jury was not even told that this was required. Although the court did inform the jury that the defendants were presumed to be innocent "until proven guilty of all the elements of the offense beyond a reasonable doubt," and then went on to tell the jury that "the burden of proof beyond a reasonable doubt applies to each charge as a whole,"* the jury was left totally uninstructed as to what those elements were.

Since the trial court erroneously charged the jury that the defendants had the right "to rely upon the testimony already in the record for their defenses without adding to it,"** the jury may very well have assumed that the defendant Howard, who,

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* T.946.

** T.952.

unlike his co-defendant, had not offered any defense, had the burden of proving that he was not a perpetrator.

Thus, unlike the situation in Evans, where the trial court had carefully and accurately instructed the jury or that in Telfaire, where the court ruled that in view of the trial court's instructions, which included an instruction relating to the problem of mistaken identity, the jury's attention "was significantly focused on the issue of identity,* in the case at bar the jury's attention was diverted from that crucial issue. This was the inevitable result of not only the glaring inadequacy of the instructions given, but was telegraphed to the jury by the trial court's attitude and statements when the identification problems were alluded to by defense counsel during summations.

Counsel for the co-defendant Fernandez, who gave the first closing statement, focused immediately on those problems. (T.875-6)

Beginning to address herself to that question, counsel said:

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* 469 F.2d at p. 556.

> I am going to discuss this issue at length with you. It is a matter that the Supreme Court of the United States has concerned itself with --.
>
> (T.876)

At this point the prosecutor objected, interjecting that the Supreme Court "is not the jury's concern." (Ibid.) Whereupon the trial judge declared:

> I have opinions on my desk issued by the (Supreme) Court within the last 48 hours so I am familiar with it and if there is any law to be recited here it will be done by the Court and not by the attorneys.
>
> (Ibid.)

Starting anew, counsel called attention to the fact that one of the major problems in criminal cases involved that of mistaken identification and attempted to tell the jury what Mr. Justice Frankfurter had observed in that regard (T.877).

Once again, there was an objection at which juncture the court opined:

> I think it would be well to confine yourself to the issues in this case.
>
> (Ibid.)

Thus, the jury had to believe that the problem of misidentification was non-existent, and most certainly that the subsequent failure of the court to even mention that problem, or,

indeed, to even allude to the entire area of identification, must have served to confirm that impression.

But even prior to the closing statements, the trial court was deprecating the issue of mistaken identification and the problems attendant upon the utilization of photographs to identify the defendants.

When counsel for Howard asked the witness Josephine Denisco, who had made an in-court identification of the defendant on direct examination (T.629-30), how long it had taken her to pick out the defendant's photograph, the trial court gratuitously interjected:

> It doesn't take long to look at a picture. I will take judicial notice of that.
>
> (T.645)

At another point during the cross-examination of a principal prosecution witnesss, the court declared:

> Photographs speak louder than words.
>
> (T.623)

Thus, far from expressing any concern, much less cautioning the jury, about the dangers of mistaken identification, especially where photographs were utilized, the trial court was deflecting the jury's attention away from the seriousness of those dangers.

And, as already noted, this stance and attitude persisted. At a later point in her summation, counsel observed that the Government's failure to conduct a lineup after Fernandez was in custody exacerbated the danger of a mistaken identification, a danger that was real when the eyewitnesses were shown but one photograph of a light-skinned black person (T.890). After all of this was said, the prosecutor spoke up:

> Excuse me, I think the pre-trial procedures employed by the Government have been moved upon.
>
> (T.890-1)

The court replied in laconic fashion:

> That is true. (T.891)

Moments later counsel was attempting to point out to the jury one of the factors that "authorities" in the field had observed as having significance with respect to misidentification, and was abruptly cut off by the prosecutor, who exclaimed that:

> Excuse me, your Honor. This is reverting back to a lecture, again. There are no authorities in evidence except the witnesses who identified the defendant.
>
> (T.892)

Once again, the court replied:

That is true. (Ibid.)

When counsel pointed out that there were special problems relating to persons of one race attempting to identify persons of another race and that the margin of error was greater, the prosecutor's general objection was sustained (T.894).

Alluding to the uncontrovertible fact that the annals of history were replete with instances of persons who were convicted because of a mistaken identification, the trial court sustained an objection, stating:

> I think we should not go to any length on the annals of history.
>
> (T.902)

A mere reference to the Sacco-Vanzetti case brought this retort from the court:

> Yes, we are not trying the Sacco Vanzetti case here. We have two defendants here on trial and they are not Sacco or Vanzetti.
>
> (Ibid.)

The following colloquy then ensued:

> MRS. PIEL: Your Honor, the issue of mistaken identity obtains in the law and it obtains --
>
> THE COURT: I have ruled on the issue here and I ask you to pay attention to my ruling and I direct you to observe them.
>
> (T.902)

It would seem clear that far from focusing on the issue, the trial court gave the appearance of suggesting to the jury that not only were the problems of misidentification spurious, but that the very issue had been disposed of at a pre-trial hearing. This impression was undoubtedly confirmed when the court did not even mention or refer to the identity of the perpetrators, much less the special problems relating to photographic identification, in its charge.

Perhaps the attitude manifested by the trial court which relayed to the jury that misidentification was not a real problem in this case might have been cured by appropriate instructions. But the utter failure to even refer to the issue of the identity of the perpetrators, much less the special problems in this area, mandates a reversal of the conviction.

POINT II

THE IN-COURT IDENTIFICATION OF THE DEFENDANT SHOULD HAVE BEEN EXCLUDED BECAUSE OF THE IMPERMISSIBLY SUGGESTIVE PROCEDURES UTILIZED PRIOR TO TRIAL WHICH RESULTED IN A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION

The robbery in question occurred on December 24, 1970. On February 10, 1971, Agent Sweeney went to the bank where he

displayed a group of six photographs* to several bank employees (T.587-8, 708-9, 723).**

The surveillance photographs*** revealed that one of the perpetrators, subsequently identified by the witnesses as the defendant Howard, was wearing sunglasses during the course of the robbery (T.823).

Agent Sweeney testified that only one of the six photographs (Govt. Exh. 7) shown to the eyewitnesses depicted an individual wearing sunglasses, the photograph of Howard (T.823-5).

Sweeney acknowledged that the photograph of the defendant wearing sunglasses, which was displayed to the witnesses, was taken after Howard's arrest,**** was but one of several photographs taken of him on that occasion, and that in those other photographs the defendant was not wearing sunglasses (Defendant's Exh. F; T.823-4). The photographs of the defendant without sunglasses were never displayed to the witnesses.

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* Government Exhibit 7.

** One employee Barbara Gerondel, was shown the same photograph on March 2, 1971 (T.654-5).

*** Government Exhibit 4.

**** Howard was arrested on February 2, 1971 (T.15). The photographs of the defendant were taken at the Federal Detention Headquarters in New York City in Sweeney's presence (T.20). No lineup was ever conducted. (T.71).

Moreover, there was testimony by one of the eyewitnesses that none of the individuals whose photographs were exhibited was heavy set, except the defendant (T.603).*

When these same witnesses were questioned by the Federal Bureau of Investigation on the day of the robbery, several of them described one of the perpetrators as being heavy set (T.598, 636-7, 663, 713, 725-6).

In addition, each one of the eyewitnesses who made an in-court identification of Howard was shown either his photographs or the surveillance photographs, or both, immediately prior to testifying at the trial (T.612, 648, 718, 729).

In United States v. Telfaire, supra, the court declined to hold that a special identification instruction was required, because:

> ...this case exhibits none of the special difficulties often prevented by identification testimony that would require additional information be given to the jury in order for us to repose confidence in their ability to evaluate the reliability of the identification.
>
> (469 F.2d at p. 556)

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* It would also appear that only the photograph of Howard showed the lower part of the torso (T.77-8). In effect, he was the only person whose body could be seen and thus described by the viewer.

Similarly, this Court in United States v. Evans, supra, held that a special identification instruction was not mandated under the circumstances of that case because (a) the eyewitnesses were shown the photographs of the defendant "within hours after the robbery, while their recollections were still fresh,"* (b) there were "no distinctive characteristics about EVan's photograph as compared to those of the others."**

This Court reversed the conviction in Fernandez I precisely because of

> ...the combined effect of the error in admitting the photographic identification testimony, (and) in failing to give a cautionary instruction on the danger of misidentification....
>
> (456 F.2d at p. 642)***

In the case at bar, the exhibiting of the defendant's photograph to the witnesses where he alone was wearing sunglasses and was the only heavy set person depicted in the array; the lapse

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* 484 F.2d at p. 1185.

** Ibid.

*** Another ground for reversal was the trial court compelling defense counsel to make objections to the charge in the the presence of the jury.

of time between the robbery and the photographic display; the showing on two occasions of the defendant's photograph and the surveillance photographs to the identification witnesses just prior to their testifying at the trial; combined with the refusal of the court to give the special identification instruction, or to even instruct the jury that the Government had to establish the identification of the defendant beyond a reasonable doubt, requires reversal of the conviction.

POINT III

THE JURY WAS IMPROPERLY EMPANELED. MOREOVER, THE TRIAL COURT'S REFUSAL TO CONDUCT A HEARING WITH RESPECT TO AN INCIDENT WHICH MAY HAVE AFFECTED THE JURY'S VERDICT WAS IMPROPER

A. The Jury Was Improperly Empaneled

Toward the conclusion of the voir dire of the jury, one of the prospective jurors* stated that:

> I would not be able to stay on the whole trial. She /referring to counsel/ said before, it may run for a week or so and I feel that I would not be able to stay because I am only allowed five days jury duty from my company, that is all they pay for.
>
> (V.85)

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* Leo Denino (V.76).

Both the trial court and the prosecutor opined that they did not think the trial would last more than five days. The following colloquy then took place:

> MRS. PIEL: I say to Your Honor the defendant is prejudiced if we have a juror --
>
> THE COURT: I say I do not think it will last that long.
>
> MRS. PIEL: I have no idea.
>
> THE COURT: I have answered the question so poll the jury.

(V.86)

At this point, two alternate jurors were summoned and the voir dire continued (Ibid.). After counsel for defendant Howard had concluded her examination of the alternate jurors, she directed a question to that juror who had previously expressed concern about serving on the jury and elicited the fact that that juror had already completed three days of jury service (V.93). Counsel then sought to confirm the fact that the juror in question would be paid by his employer for only two more days of jury service (Ibid.). Before there was a response, the trial judge interrupted, saying:

> Can we conclude Miss? We have been over this ground so often.

(V.93)

Counsel for defendant Fernandez then undertook to question that juror with the following results:

MRS. PIEL: I would like to ask this one juror if it would affect him if he has to sit and not be paid in this case.

THE COURT: I have passed on that matter. Let us go on. I have passed on that question.

MRS. PIEL: The defendant is going to have a juror who is possibly going to be prejudiced against him.

THE COURT: I will take care of that situation if the time comes. Proceed.

MRS. PIEL: I would like to be heard before the juror is sworn in. May I approach the bench on the question?

THE COURT: Proceed.

MR. SCHLAM: I have no further questions, Your Honor.

(V.93-4)

To interrupt the colloquy at this point, it is clear that defense counsel were attempting, and quite properly, to pursue the questioning of the one regular juror who would only be paid for two additional days of jury service, with the obvious purpose of ascertaining whether he would be biased or prejudiced if forced to serve without receiving his salary. To cut off his

inquiry was prejudicial enough, but what immediately followed, served to deprive the defendant of his statutory right to exercise a peremptory challenge of any of the alternate jurors.

After the prosecutor advised the court that he had no further questions, there ensued the following:

THE COURT: Is the jury satisfactory?

MRS. PIEL: I would like to be heard.

MRS. BEELER: I would also, Your Honor.

THE COURT: Members of the jury, rise and raise your right hand.

(V.94)

Without any further ado, the jurors were sworn and the court adjourned for the day (ibid).

Rule 24(c) of the Federal Rules of Criminal Procedure provides that where one or two alternate jurors are to be empaneled, as was the case here, each side is entitled to one additional peremptory challenge. This statutory right was denied the defendant when the trial court abruptly directed the jury to be empaneled at the very moment that defense counsel sought to be heard.

The following day, before the opening statements were made, counsel challenged the jury selection and particularly the effective denial of their right to exercise a peremptory challenge against one of the alternate jurors (T.514-9). The trial court's response was:

> I've heard enough. We are going to proceed.
>
> (T.517)*

While it is acknowledged that a trial court has rather extensive discretion insofar as the conduct of the jury selection process is concerned, the granting and exercise of the right to peremptory challenges is governed by Rule 24, which has the effect of statutory law. The trial court's refusal to permit the defendant an opportunity to challenge an alternate juror exceeded the bounds of judicial discretion in that it

> 'prevent/ed/...the full, unrestricted exercise by the accused of his right of peremptory challenge.'
>
> United States v. Sams, 470 F.2d 751, 744 (5th Cir., 1972)

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* The defendant moved both at the end of the Government's case and again at the end of the entire case for a judgment of acquittal based on the impermissible procedures used in empaneling the jury, which motions were denied (T.758, 872-3).

On the following day, one of the jurors was excused, and one of the alternate jurors sworn in (T.697).

The denial of that right in and of itself requires the setting aside of the conviction. United States v. Sams, supra.

The circumstances underlying the removal of a juror during the trial and the proceedings relating to those circumstances serve to highlight the effect of impropriety which seemed to dominate the trial.

B. The Arrest of the Defendant in View of the Jury

At the close of court on June 25, 1971, the defendant Howard was arrested on an unrelated charge by a United States Marshal in the lobby of the courthouse (T.684-5). The trial judge was advised of this the following morning and was further advised by counsel that the incident had been observed by at least one juror (T.685). The court was further advised that given the time when, and the place where, the arrest of the defendant had occurred, there was a substantial likelihood that several, if not all, of the jurors had observed it (T.686). Based on those facts, Howard's counsel moved for a mistrial (T.687).

At the Government's request and without prejudice to the motion for a mistrial, counsel consented to the removal of the one juror who it was certain had witnessed the incident (T.688-694).

It was understood that in the event Howard was convicted, a hearing would be held to determine whether the remaining jurors had witnessed the arrest (T.955-8).

After a guilty verdict was brought in on June 30, 1971, Howard's counsel renewed her request for such a hearing (T.973-6). Counsel further requested that each juror be questioned separately out of the presence of fellow jurors (T.979).

Without expressly ruling on her request, the court abruptly summoned the jury and asked the assembled panel the following question:

> Did any juror observe an incident as to the defendant Horsun Howard on the late afternoon of Thursday, June 24th, after the jury had been selected and left the building?
>
> (T.981)

Counsel pointed out that the incident did not occur on the day the jury was selected but the day following, to which the court responded in somewhat enigmatic fashion:

Oh. I know about that.

(Ibid.)

One juror responded and related how she had been with the juror who had been removed from the jury and had seen "a lot of people who were in the back of the courtroom running in the hallway, but I didn't know what it was about." (T.982)

The court then inquired:

> You didn't observe any incident?

The juror replied:

> No. I didn't see anyone. I know there was something going on, but I didn't know what.
>
> (Ibid.)

Counsel's request to ask that juror some further questions was summarily denied and the jury discharged. (T.982-3)

Based on the foregoing incident and the proceedings that followed, Howard's counsel moved to set aside the verdict, which was denied (T.983-4).

It was incumbent upon the trial court to conduct an evidentiary hearing or, at minimum, to permit Howard's counsel to inquire further of the one juror who acknowledged viewing a commotion. Surely, there was a need to ascertain whether the arrest of the defendant in full public view had been witnessed

by the jurors and, if so, whether that fact affected their verdict. The method adopted by the court, over objection, was not calculated to gain an open and forthright response from the jurors.

In United States v. Nash, 414 F.2d 234 (2d Cir., 1969), a three day evidentiary hearing was held by the trial court to determine whether the alternate jurors had been in contact with the regular jurors during their deliberations. And, in United States v. Allison, 481 F.2d 468 (5th Cir., 1973), the court remanded proceedings for an evidentiary hearing to determine if there was a reasonable possibility that the presence of an alternate juror during the jury's deliberations had affected the verdict.

No less should be done here.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

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